The Monetary Consequences Companies Face from a President Biden FTC Consumer Protection Bureau Might Look Very Different

Randal Shaheen and Jack Ferry

The 2020 Presidential election offers voters stark choices across a number of different significant policy areas. Many of these, no doubt, will be highlighted in the debates as well as the myriad television and social media advertisements. None of this is surprising.

What is perhaps surprising is that the choice of the next President will also likely have an important impact on the direction the Federal Trade Commission takes with respect to its Consumer Protection mission, particularly when it comes to consumer redress and civil penalties.[1] Not that long ago, former Commissioner Maureen K. Ohlhausen wrote about the Commission's remarkable consensus on consumer protection matters.[2] However, like so many other things in Washington, D.C., such consensus has given way to discord. We strongly suspect that no debate moderator will ask a question about consumer redress and no campaign commercial will tout a candidate as "strong" on consumer protection. So, we have taken it upon ourselves to do it for them and examine the important consumer redress and civil penalty consumer protection issues likely at stake in the upcoming election.

That we are even discussing partisan differences at the FTC is equally surprising in light of what has happened over the last two years. Most pundits would have likely predicted a ramping down of enforcement activities and new enforcement initiatives by a business friendly, Republican-led FTC. However, like much of punditry in general these days, they would have been wrong. In the consumer protection space, the FTC has continued to bring enforcement actions and, if anything, the number of cases has risen in recent years. Moreover, the FTC has expressly stated an interest in bringing more cases that result in penalties, in examining novel theories of consumer redress, and in targeting large, legitimate companies. Yet, notwithstanding an unexpectedly aggressive Republican-led FTC, the two Democratic Commissioners have consistently written strong dissenting opinions urging the FTC to act even more aggressively in sanctioning companies monetarily. Disagreement among the Commissioners in this area has arisen primarily in the context of (1) reward for self-reporting order violations; (2) purpose and calculation of consumer redress; (3) limiting redress to situations where a "price premium" was paid; and (5) Scope of the Restore Online Shoppers' Confidence Act (ROSCA) and greater use of civil penalty provisions. Were former Vice President Biden to become President, it seems likely that a new Democratic led Commission would make the minority views in these issues the majority.[3]

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[1] The same is also likely true with respect to the FTC's competition mission, but we leave that topic to others more qualified to address it.

[2] Maureen K. Ohlhausen, *Administrative Litigation at the FTC: Effective Tool for Developing the Law or Rubber Stamp*?, 12 J. Competition L. & Econ. 642 (2016), https://doi.org/10.1093/joclec/nhw028.

[3] The Commissioners have debated changes in other areas as well, including coming up with other, more novel forms of relief, such as a notice of allegedly deceptive claims to consumers and the scope of individual liability.

The Commissioners

In 2018, for the first time since the Commission was established in 1917, five new commissioners were sworn into office after being nominated by the President and confirmed by the Senate. However, simply because they were appointed in 2018 does not necessarily mean that their seven-year term started then. Several of the Commissioners are continuing a term started by a previous Commissioner, and the clock does not reset.

The current Chairman of the FTC, Joseph Simons, has a background in antitrust, having previously served as Director of the FTC's Bureau of Competition. His term expires on September 25, 2024. The other Republican commissioners are Noah Phillips and Christine Wilson. Mr. Phillips served as Chief Counsel to Senator John Cornyn (R-TX) prior to joining the FTC and his term expires on September 25, 2023. Ms. Wilson came to the FTC by way of Delta Air Lines and private practice prior to that, and her term expires on September 25, 2025.

On the Democratic side, the commissioners are Rohit Chopra and Rebecca Kelly Slaughter. An ally of Senator Elizabeth Warren (D-MA), Mr. Chopra helped launch the Consumer Financial Protection Bureau and served there as an Assistant Director and Student Loan Ombudsman. Mr. Chopra's term expired on September 25, 2019, but a replacement has not been appointed and he remains in the position. Prior to joining the FTC, Ms. Slaughter was Chief Counsel to Senator Charles Schumer (D-NY). Ms. Slaughter's term is set to expire September 25, 2022.

Were Biden elected President, no Republican seat would become vacant until 2023, meaning Republicans would continue to control the FTC for most of a President Biden's first term. However, the President has authority to designate the Chairman of the FTC, meaning Chairman Simons would likely be replaced and would become a regular Commissioner. In the past, demoted Chairmen have tended to resign rather than serve out their full term. Were that to occur, a President Biden would have an opportunity to nominate a Democrat as Chairman Simons' replacement. However, in so many ways past is no longer prologue, and the possibility of dramatic changes in Commission policy in one direction or the other might bring an end to this somewhat regular practice.

The Issues

We discuss below disagreements between the Commissioners over the purpose of consumer redress and how to calculate it, as well as how the impact of a more aggressive application of consumer redress could magnify the importance of other changes the Commission is debating—namely whether the Commission should continue to exercise enforcement discretion when a company has detected and corrected a potential Section 5 violation on its own accord and potentially expanding the jurisdictional scope of ROSCA.

Purpose and Calculation of Consumer Redress. Increasingly, the FTC includes consumer redress as part of its settlements or the relief it seeks in litigation. Redress, unlike a civil penalty or other forms of monetary relief, is intended to make consumers whole from any harm they suffered from the alleged deception. In some cases, such as a dietary supplement that promotes a baldness cure, the product may deliver no benefit to consumers and so the resulting consumer injury equals the entire purchase price. In other instances, such as a food that promotes a misleading health benefit, the food may deliver other meaningful benefits to consumers and so any consumer injury is something less than the entire purchase price.[4]

[4] There is also the possibility that only some consumers were deceived and that other consumers got exactly what they bargained for. However, to date the Commission has not shown itself receptive to such an argument in calculating the amount of any consumer redress.

Not surprisingly, there are thus often disputes over exactly how to calculate the amount of any consumer redress.[5] In the recent *Progressive Leasing* case,[6] Commissioners Wilson and Slaughter debated the extent to which consumer redress should be tethered to actual consumer harm. As noted below, Commissioner Slaughter appeared to suggest a willingness on her part to "untether" consumer redress, at least in part, from actual consumer harm. Were this to become Commission policy, not only might it face a potential legal challenge,[7] it would also have significant repercussions for companies selling otherwise legitimate products that make one or more deceptive claims.

Purpose of Consumer Redress: Progressive Leasing Settlement (Rent to Own). Progressive's program is available as a financing option in third-party big box stores. It mimics many traditional credit card financing programs where a consumer can pay no interest for a period of months and then, at the end of that period, pay off the remaining balance with no penalty or added interest. Should the consumer not pay off the balance at the end of that period, interest charges begin to accrue, and she may also be subject to a charge for the deferred interest during the initial interest-free period. Often these credit programs go by names such as "90 days same as cash."

Progressive and its retail partners offered a similar "90 days same as cash" program. The problem, however, was that consumers paid a nonrefundable fee at the beginning of the contract, so that even if they paid for the product in full at the end of the 90 days, they would pay the actual purchase price plus the initial fee. The FTC alleged that this additional fee was not adequately disclosed in numerous advertising materials, including marketing materials prepared by some of Progressive's retail partners, which were subject to review and approval by Progressive. The FTC also complained about several other practices, including stating to consumers that there was no interest. The FTC argued that such statement, while perhaps expressly true since the transaction was "rent to own," implied that the ultimate cost to the consumer was no different from the initial purchase price. The FTC also alleged that this implication was reinforced by the failure of the defendant to adequately disclose the final full cost of the transaction should the consumer complete all of her "rent" payments and own the product. The FTC alleged that often the cost of the product through the rent to own program was double the cost to have simply purchased the product outright—that, for example, a $1,000 mattress would cost $2,000 for a consumer who enrolled in a 12-month rent to own program.

Progressive's settlement with the FTC included injunctive relief and $175 million in consumer redress. However, the settlement generated a dissent by Commissioner Slaughter[8] and a responding concurrence by Commissioner Wilson,[9] both of which focused in part on the redress amount.

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[5] It is worth noting that in many cases the defendant is unable to pay the full amount of consumer redress no matter how it is precisely calculated. In these cases, the Commission, while it still calculates a total redress amount, settles based upon the defendant's "ability to pay." Thus, in these cases there is little incentive for the parties to engage in a lengthy back and forth over the precise amount of the larger, uncollectible redress amount.

[6] FTC v. Progressive Leasing, LLC, No. 1:20-cv-01668 (N.D. Ga. Apr. 22, 2020).

[7] The Supreme Court recently addressed the SEC's authority to seek restitution in *Liu v. Securities and Exchange Comm'n*, 591 U.S. 2 (2020). Following that decision, the Supreme Court granted certiorari in a pair of cases challenging the FTC's authority to seek consumer redress along with injunctive relief in federal court: *FTC v. Credit Bureau Center, LLC,* 937 F.3d 764 (7th Cir. 2019), and *AMG Capital Management.,* LLC v. FTC, 910 F.3d 417 (9th Cir. 2018). The Supreme Court's decision in these cases could potentially impede any effort to expand the consumer redress remedy, including seeking redress that arguably goes beyond any unjust enrichment, let alone beyond the extent of provable consumer harm.

[8] Dissenting Statement of Commissioner Rebecca Kelly Slaughter Regarding FTC v. Progressive Leasing, FTC File No. 182 3127 (Apr. 20, 2020), https://www.ftc.gov/system/files/documents/public_statements/1571915/182_3127_prog_leasing_-_dissenting_statement_of_commissioner_rebecca_kelly_slaughter_0.pdf.

[9] Concurring Statement of Commissioner Christine S. Wilson FTC v. Progressive Leasing, LLC, FTC File No. 182 3127 (Apr. 20, 2020), https://www.ftc.gov/system/files/documents/public_statements/1571921/182_3127_prog_leasing_-_statement_of_commissioner_christine_s_wilson_0.pdf.

Both Commissioners agreed that the starting point for any redress calculation is total net revenues from the relevant products or services—in this case, more than $1 billion, because net revenues reflect the actual amount of dollars spent by consumers on the relevant goods or services. Commissioner Slaughter put it in terms of the burden shifting to the defendant to show that total net revenues are not the appropriate amount, while Commissioner Wilson noted that total net revenues are often a "reasonable approximation" of ill-gotten gains.

Commissioner Wilson argued that the actual redress amount should be tied to proven consumer injury. She listed several factors that the Commission's Bureau of Economics uses in any redress calculation: number of affected consumers; whether consumers were deceived; type of alleged violations; and the harm from those violations. In this case, of course, one clear setoff would be that many consumers got the consumer good they wanted but may have overpaid by some amount so their actual injury would be the overpayment, not the total value of the transaction. Commissioner Wilson argued that the redress obtained by the Commission was in line with the analysis done by the Bureau of Economics, using the factors listed above. Commissioner Slaughter, however, endorsed the view that redress should also serve a deterrence or punitive purpose, and that if the redress departs significantly from net revenues, it may not adequately deter companies from wrongdoing. This leaves open at least the possibility that even if consumer harm is less than net revenues, there may be other factors such as deterrence that weigh against any reduction in the redress amount.

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Calculation of Consumer Redress: Situations Where Consumer Harm Is Not Clear. In addition to scenarios where redress may be limited by the fact that a product or service provides some legitimate benefit, the Commission has also grappled with situations where the product performs as advertised but there is some characteristic of the product that is misrepresented—for example, that a product is biodegradable or "Made in USA." Determining the value of such a claim to consumers can be difficult, particularly if there is no way to prove that consumers paid a price premium for the product based upon the advertised characteristic. The two Democratic Commissioners have urged the FTC to be receptive to calculating and seeking consumer redress in these situations (though the precise method of calculation remains unclear), and a very recent Made in USA settlement suggests that their view may have now been embraced by the Commission as a whole. Given this, it is reasonable to expect that a majority Democrat Commission would be even more aggressive in seeking consumer redress in these situations.

Made in USA Settlements. The FTC regularly brings cases against companies that claim their products are "Made in USA" when they do not meet the standard of "all or virtually all made in the United States." The analysis can become somewhat complex, but what is important here is that the Commission has never previously sought consumer redress in a Made in USA case. In the past, such cases only involved money when penalties were imposed for violating an existing order. In other words, only recidivist offenders had to pay—the first time only injunctive relief was imposed.

In a concurring statement in a series of Made in USA settlements announced in September 2018, Commissioner Slaughter and Chairman Simons noted the possibility that consumer redress could be an option for Made in USA enforcement when consumers paid a premium for the allegedly mislabeled products.[10] Both Commissioners emphasized the importance of the Commission's intended review of its approach to remedies and stressed the need to have a forward-looking

[10] Concurring Statement of Commissioner Rebecca Kelly Slaughter, In Which Chairman Joe Simons Joins Regarding the Matters of Nectar Sleep, Sandpiper/PiperGear, and Patriot Puck, FTC File Nos. 182 3113, 182 3095 and 1823038, (Sept. 12, 2018), https://www.ftc.gov/system/files/documents/public_statements/1407368/182_3038_nectar_sandpiper_patriot_rks_and_jjs_concurring_statement_0.pdf.

approach to the issue, including signaling to the public how the Commission intends to approach enforcement in this area.

This bipartisan approach collapsed, however, when the orders were accepted for final entry. Commissioner Slaughter reversed her position and dissented, arguing, in light of her newfound understanding, that a showing of a price premium was not legally required to seek redress, and she would now seek consumer redress given the egregious nature of the violations.[11] This time, Chairman Simons wrote separately to state that he had that understanding all along but still preferred a forward-looking approach, and he cited the upcoming Made in USA workshop as an appropriate vehicle to consider such issues as the use of new or expanded remedies.[12] The Chairman then concluded by saying that

> in considering new remedies and litigation strategies, it is important that the agency not do so in a vacuum. It will be crucial for the Commission to understand whether pursuing an alternative approach may drain resources from or otherwise undermine the FTC's other important enforcement programs without commensurate benefits to consumers.[13]

[A] Democratic Commission would likely accelerate the trend of seeking redress for a broader set of misrepresentations, including those where determining consumer injury has traditionally been viewed as difficult at best.

Somewhat surprisingly this partisan split then healed itself in March 2020, when a now unanimous Commission accepted a Made in the USA settlement with Williams-Sonoma that includes a $1 million consumer redress payment.[14] However, the Commission took this unprecedented step without having yet issued any report from its Made in USA workshop or any explanatory statements as to how the redress amount was determined. One can guess that some or perhaps all of the Commissioners viewed the violation as outrageous, in that the Commission closed a similar investigation in 2018 against Williams-Sonoma based in part on the company's assurance that it would undertake a review of its Made in USA claims process. However, at least up until this point, a majority of the Commission had not expressed support for consumer redress under such circumstances. Of course, absent any explanation, it is also entirely possible that the Commissioners felt there was adequate evidence that consumers had paid a price premium for the products in question. In sum, the proposed settlement leads to a lot of unanswered questions. What were the factors that led the Commission to unanimously seek consumer redress? How does the Commission intend to use such factors in the future? Are there other factors that might prompt the Commission to seek redress in Made in the USA cases?[15] As noted above, a Democratic Commission would likely accelerate the trend of seeking redress for a broader set of misrepresentations, including those where determining consumer injury has traditionally been viewed as difficult at best.

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[11] Dissenting Statement of Commissioner Rebecca Kelly Slaughter Regarding the Matters of Sandpiper/PiperGear and Patriot Puck, FTC File Nos. 182 3113 and 182 3095, (Apr. 17, 2019), https://www.ftc.gov/system/files/documents/public_statements/1514780/sandpiper_patriot_puck_slaughter_dissenting_statement-4-17-19.pdf.

[12] Concurring Statement of Chairman Joe Simons, Regarding the Matters of Sandpiper/PiperGear and Patriot Puck, FTC File Nos. 182 3113 and 182 3095 (Apr. 17, 2019), https://www.ftc.gov/system/files/documents/public_statements/1514773/sandpiper_patriot_puck_simons_concurring_statement_4-17-19.pdf.

[13] *Id.*

[14] Williams-Sonoma, Inc., FTC No. 202 3025 (July 16, 2020), https://www.ftc.gov/enforcement/cases-proceedings/202-3025/williams-sonoma-inc-matter

[15] The Commission has recently proposed turning its Made in USA guidance into a formal rule, which would enable it to seek civil penalties for any violation and thus bypass the question of actual consumer harm. Made in USA Labeling Rule, 85 Fed. Reg. 43,162 (proposed July 16, 2020) (to be codified at 16 C.F.R. pt. 323).

Reward for Self-Correcting Violations

The push by some Commissioners to expand the use of consumer redress and civil penalties becomes even more important when one looks at how one or both of those same Commissioners have proposed expanding the Commission's enforcement policies. One such area involves companies that independently detect and correct Section 5 violations

In the past, as a matter of enforcement discretion, the FTC has typically opted not to pursue an action against companies that find and correct Section 5 violations prior to the commencement of any Commission investigation. The rationale for this is clear. Absent such a policy, companies might be less vigilant and may fear to correct arguably unlawful behavior for fear it could constitute an admission of wrongdoing. At the same time, the FTC lacks the resources and ability to quickly detect and enjoin every Section 5 violation, so voluntary action on the part of companies can be of significant benefit to consumers. This same policy and rationale applies to compliance with FTC consent orders. After a company enters into a consent order with the FTC, it typically has numerous ongoing compliance obligations. Failure to comply with these obligations can subject the company to substantial civil penalties. Typically, a company is required to file an initial compliance report. Additional reports, however, are often not required unless requested by the Commission. An August 2018 controversy involving a company's failure to fully pay out consumer redress funds suggests that this "consensus" view may be fraying.

Speedway Settlement. This controversy arose out of a 2003 complaint pursuant to which Speedway entered into a settlement agreement with the FTC following allegedly deceptive statements it made about a fuel additive.[16] The company agreed to pay $1 million to harmed consumers. However, $80,000 of the $1 million total was distributed through checks that ultimately were not cashed. In such a situation, Speedway was supposed to redistribute the uncashed funds to those recipients who had received and cashed checks. The company self-reported to the FTC in 2018 that it had not redistributed the $80,000, but that it was willing to cut a check for that amount to the U.S. Treasury instead of sending checks for approximately $1.00 to each of the initial eligible recipients.

In the majority decision, Commissioners Simons, Phillips, Wilson, and Slaughter accepted this proposal.[17] The decision noted that this practice is not new and that the Commission has previously permitted the remittance of uncashed funds to the Treasury. Furthermore, the decision also cited the cost to the Commission of forcing Speedway to comply and the fact that Speedway self-reported a violation. If it had not done so, then it is unlikely the funds would be recovered at all. Finally, the majority noted the significant period of time that had elapsed and that there was no evidence that the failure to comply was intentional. Clearly had Speedway deliberately opted not to send out the additional checks and then quickly reported the violation to the FTC in an effort to seek leniency for its intentional violation, the outcome might have been quite different.

Commissioner Chopra dissented.[18] He noted that permitting Speedway to pay the $80,000 to the Treasury was in effect a discount. While the total amount of the funds distributed would be the same, there would have otherwise been a cost to the company in sending separate checks to tens of thousands of consumers. Commissioner Chopra suggested that these costs would be in the hundreds of thousands of dollars and argued that they were specifically the company's to

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[16] FTC v. Speedway Motorsports, Inc., No. 1:01-cv-00216 (M.D.N.C. Mar. 21, 2003).

[17] Statement of Federal Trade Commission Concerning FTC v. Speedway Motorsports, Inc., FTC File No. 002 3256 (Aug. 9, 2018), https://www.ftc.gov/system/files/documents/public_statements/1400498/x010021_oil_chem_speedway_jjs_mko_njp_rks_statement.pdf.

[18] Statement of Commissioner Rohit Chopra In the Matter of Speedway Motorsports, FTC File No. X010021 (Aug. 10, 2018), https://www.ftc.gov/system/files/documents/public_statements/1400510/x010021_oil_chem_speedway_rc_statement.pdf.

bear under the original order. The dissenting statement read: "Rather than focusing exclusively on the undistributed consumer refunds, the Commission should have considered the full extent of the financial gains realized by flouting our order."[19] Commissioner Chopra argued that rewarding a company that violated a consumer protection order sets a poor precedent and stated "leniency should not be our default."[20]

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Commissioner Slaughter, who sided with the majority, weighed in on Twitter in response to criticism of the decision. These tweets provided some additional background to Commissioner Slaughter's rationale—most significantly, that Speedway was prepared to litigate the issue rather than comply with the order as written.[21] Not only would this have required the Commission to dedicate substantial resources to the issue, there was also the possibility that Speedway could win, considering its 92 percent compliance rate and the fact that it self-reported the violation.

Commissioner Slaughter noted that while she would support the FTC's choosing to fight in some cases, the Commission would be enabled to take on marginal cases such as this one if it had more resources. Notably, however, Commissioner Slaughter did not dispute Commissioner Chopra's statement that "leniency should not be our default," which suggests that in an appropriate circumstance, depending upon the likelihood of success in litigation and the seriousness of the violation, the Commission could bring an enforcement action against companies that voluntary correct violations prior to scrutiny by the Commission.

Scope of ROSCA

Another disagreement among the Commissioners that could also magnify the impact of any policy changes with respect to monetary sanctions involves ROSCA, which was signed into law in late 2010. Since then the Commission has brought numerous law enforcement actions. ROSCA regulates the sale of subscriptions online, so-called automatic renewal programs, including free trials, but it has been eclipsed in some ways by more restrictive state laws, particularly California's.[22] A new Democrat-led Commission could potentially change that.

Progressive Leasing (Rent to Own). In *Progressive Leasing*, previously noted, Commissioners Wilson and Slaughter disagreed not only about consumer redress, but also about whether the conduct at issue violates ROSCA, which imposes disclosure and other requirements on transactions "effected through the internet" that utilize a negative option feature. Commissioner Slaughter argued that as a general rule, the Commission should include in its complaint all applicable violations so as to send a clear signal to the marketplace as a whole as to its view of the laws it is charged with enforcing.[23] In this case, although the "purchase" of the good occurred at a brick-and-mortar location, the "rent to own" aspect of the transaction took place at the store over an internet connection. Thus, Commissioner Slaughter argued that the first prong of ROSCA is satisfied. With respect to the second requirement, the consumer continues to pay the monthly rental for the duration of the rent to own period unless she cancels the transaction and returns the good or pays off the remaining balance early. Thus, unlike a 12-month apartment lease, for example, the transaction in question here was month-to-month.

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[19] *Id.*

[20] *Id.*

[21] https://twitter.com/rkslaughterftc/status/1033103951326011392?s=11.

[22] Automatic Purchase Renewals, Cal. Bus. & Prof. Code § 17600 et seq. (2009).

[23] Dissenting Statement of Commissioner Rebecca Kelly Slaughter, *supra* note 8.

Commissioner Wilson took issue with ROSCA's applicability here. She noted that the primary purpose of ROSCA is to prevent misleading online sales tactics involving recurring payments for goods or services that result in consumers paying for goods or services they do not expect or want.[24] She argued that the mere fact the "paperwork" is completed online does not make ROSCA applicable, noting that such a rule would expand the scope of ROSCA dramatically. Commissioner Wilson also characterized the transaction as a fixed-term lease with recurring payments rather than a monthly payment obligation that automatically renews each month until the end of the lease period. Apart from this disagreement, Commissioner Wilson also urged restraint in pleading additional violations of law in instances such as this where she believes the additional pleadings provide no added benefit to consumers.

[I]t seems likely that a Democratic-majority Commission would more frequently seek civil penalties for ROSCA violations, meaning that any decision to expand the jurisdictional scope of ROSCA would have significant financial implications.

The disagreement over the scope of ROSCA is potentially even more important because, unlike most areas of Commission enforcement, ROSCA is a specific statutory provision and civil penalties are available for any alleged violation. Notwithstanding civil penalty authority, the Commission has typically been content with only seeking consumer redress. Given the eagerness of the two Democratic Commissioners, in particular, to seek civil penalty authority for Made in USA violations, it seems likely that a Democratic-majority Commission would more frequently seek civil penalties for ROSCA violations, meaning that any decision to expand the jurisdictional scope of ROSCA would have significant financial implications.

Conclusion

To conclude we ask the question: what would a Democratic-majority FTC look like with regard to potential monetary consequences for consumer protection violations? It is clear that the two Democratic Commissioners are not satisfied by the current level of enforcement and penalties. What is particularly notable, however, is that while they have advocated for more cases and higher penalties, they have also suggested interpreting current laws more broadly to allow for novel cases and penalties. For example, in the most recent case we discussed, *Progressive Leasing*, Commissioner Slaughter argued for a broader interpretation of ROSCA that would cover more kinds of transactions.

The key question for industry should the Commission's majority change parties is whether the types of significant changes the two Democratic Commissioners have called for with respect to how and when the Commission seeks monetary as well as injunctive relief will be implemented in a way that provides guidance and standards such that enforcement is predictable and fair. In that way, companies that want to avoid FTC entanglements have a clear path to do so. Regardless, in the event that a Democrat is President in 2021, an already active Commission is likely to become more active and more aggressive with respect to monetary remedies. ●

[24] Concurring Statement of Commissioner Christine S. Wilson, *supra* note 9.